87-1618

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL L. LEWICKI
SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER petitioner's sixth amendment right of confrontation was violated by the admission of the out-of-court statement of the alleged victim where the victim did not appear at trial or at any other time, and the government failed to demonstrate that the alleged victim was unavailable for purposes of the sixth amendment, and where that statement lacked sufficient indicia of reliability and trustworthiness.

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DANIEL L. LEWICKI
SERGEANT, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Daniel L. Lewicki, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at Docket No. 54,572/AR, ___ M.J. ___ (C.M.A., February 2, 1988) (Appendix A). The opinion of the Army Court of Military Review is an unpublished decision, CM 446504 (A.C.M.R., December 9, 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 2, 1988, affirming petitioner's conviction dated September 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Statement of the Case

Petitioner was tried by a general court-martial composed of officer and enlisted members at Fort Devens, Massachusetts, on September 7, 17, and 18, 1984. Contrary to his plea, he was convicted of a single offense of taking indecent liberties with two children who were under the age of 16 by exposing his penis to them, and encouraging and allowing them to touch him with the intent to gratify his lust.[1] Petitioner was sentenced to a dishonorable discharge. The sentence was approved in accordance with Article 60, U.C.M.J. The United States Army Court of Military Review affirmed the findings of guilty and the sentence. The issue granted by the United States Court of Military Appeals, satisfying a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER ADMISSION OF THE STATEMENTS OF ONE ALLEGED VICTIM (J.A.) TO HER MOTHER VIOLATED APPELLANT'S RIGHT OF CONFRONTATON.

Disposition of that issue by the Court of Military Appeals is shown in its order at Appendix A.

Statement of Facts

The alleged victims are petitioner's four-year-old daughter, Candice, and her playmate and friend, Jennifer Aspinwall, also four years old. On June 2, 1984, Jennifer was allowed by her parents to go and play at Candice Lewicki's home in the

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[1] A violation of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.], Article 134, 10 U.S.C. § 934. The two children with whom petitioner was charged with taking these actions were his four-year-old daughter, Candice Lewicki, and her four-year-old playmate, Jennifer Aspinwall.

Fort Devens housing area. The petitioner was home and played children's games with the two girls (R. 180). The offense is alleged to have occurred between the time Jennifer was dropped off at petitioner's quarters and approximately 4:30 P.M. when Jennifer and Candice returned to the Aspinwall home. Jennifer's mother, Mrs. Aspinwall, testified that Jennifer and Candice came into the Aspinwall home and immediately went upstairs (R. 27). Mrs. Aspinwall invited Candice for dinner and gave her a note to take to petitioner to secure his permission (R. 27-8, 137). Candice went home at approximately 8:00 P.M. (R. 29, 139). Before going to bed Jennifer told her mother that while she visited her friend Candice that afternoon, petitioner had exposed his penis to Candice and herself and that they had touched it. There were no other witnesses to the alleged encounter.

In a pretrial session[2] the military judge addressed whether Jennifer Aspinwall would be available to testify at trial. Mrs. Aspinwall testified that she withheld Jennifer's appearance at the pretrial investigation (*see* Article 32, U.C.M.J.), and planned to do so at the trial as well, based on the advice of Dr. Judah, a child psychologist who was treating Jennifer (R. 18-20, 48-49). Dr. Judah's testimony at the pretrial session was that Jennifer might be able to testify with a lot of preparation and fewer observers in the courtroom (R. 76).

In denying the defense motion seeking to preclude introduction of Jennifer's out-of-court statements through her mother (R. 11, Appellate Exhibit V), the military judge ruled that Mrs. Aspinwall could testify as to what Jennifer told her the day of the incident (R. 102). The military judge *did not* find Jennifer to be unavailable, but instead based his ruling on the excited utterance exception to the hearsay rule (R. 225, 242). Although counsel raised the sixth amendment issue of confrontation, the military judge did not discuss it in denying the defense motion.

At trial, Mrs. Aspinwall testified that Jennifer told her that petitioner exposed his penis to Candice and herself and that

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[2] See Article 39(a), U.C.M.J.

she touched it. Dr. Judah testified at a pretrial hearing that Jennifer had told him that she had not touched petitioner's penis. Candice Lewicki did not testify at the court-martial.[3]

According to petitioner's testimony at trial, he had a headache and went upstairs, closed the door, and laid on the bed (R. 181-182). Petitioner stated he unbuttoned and unzipped his pants to get more comfortable before he laid down (R. 182). The next thing he recalled, his daughter and Jennifer were on either side of him and the *front* of his underwear had been pulled down below his scrotum (R. 183). Petitioner testified that he jumped up and ran into the bathroom (R. 183). According to a sworn statement which petitioner gave to agents of the Army Criminal Investigation Command (CID) and which was presented by the prosecution, Jennifer and Candice came into the room after he laid down (Prosecution Exhibits 2 and 3). Jennifer came in with fabric stuffed in her shirt, positioned so as to resemble breasts (Prosecution Exhibit 3; R. 175). Petitioner removed the excess fabric and told Jennifer not to do it again (*id.*). According to petitioner's statement, the children later returned to his room as he slept and pulled down his pants exposing his penis (*id.*).

REASONS FOR GRANTING THE WRIT

Petitioner's criminal conduct was established solely by the contested, hearsay statement of a four-year-old girl who was not subject to cross-examination. Petitioner's pretrial statement and trial testimony explained the alleged victim's allegations and were exculpatory in nature. However, in its decision against the petitioner, the Court of Military Appeals relied on the case of *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 56 U.S.L.W. 3556 (U.S. Feb. 22, 1988) (No. 87-832), in which the government presented an inculpatory statement by the accused. Although this Court denied the writ in *Arnold*, petitioner's case presents more compelling facts to resolve the issue presented.

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[3] No evidence was ever presented against petitioner at any stage of the proceedings by his daughter Candice.

The Court of Military Appeals' opinion in *Arnold*, by its own admission, is of limited precedential value.[4] The issue of whether or not a showing of unavailability is required for purposes of the Confrontation Clause when a statement falls within a firmly-rooted hearsay exception is an important federal question which has not been settled by this Honorable Court. Further, the decision of the Court of Military Appeals on this issue is in conflict with the decisions of this Honorable Court interpreting the requirements of the Confrontation Clause.

I.

WHEN THE OUT-OF-COURT STATEMENT OF A DECLARANT IS OFFERED UNDER A FIRMLY-ROOTED EXCEPTION TO THE HEARSAY RULE, THE FAILURE TO PROVIDE AN ADEQUATE SHOWING OF UNAVAILABILITY OF THE DECLARANT VIOLATES THE PURPOSES OF THE CONFRONTATION CLAUSE AND IS CONTRARY TO THIS COURT'S INTERPRETATION OF THE REQUIREMENTS OF THAT CLAUSE.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court analyzed in great detail the relationship between the Confrontation Clause and the hearsay rule. While this Court did not "map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions" (*Id.* at 64-5 (cita-

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[4] Judge Cox in his opinion stated, "Let there be no doubt . . . that this Court favors confrontation, and this case should be read very narrowly." *Arnold*, 25 M.J. at 133. The two other members of the three member Court of Military Appeals did not address the confrontation issue. Judge Sullivan, in his opinion concurring in the result, would affirm based on Arnold's confession, as corroborated by his presence in his own home at the time of the incident, and the victim's agitated demeanor the morning after the incident. *Arnold*, 25 M.J. at 134. Chief Judge Everett, in his dissenting opinion, concluded that the victim's statement to her school counselor was not an excited utterance nor did it fall within any other established hearsay exception. *Id.* at 134-35.

tions omitted)), a general approach to the problem was identified and concisely stated:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote omitted).

In establishing a requirement of unavailability, this Court recognized the "Framers' preference for face-to-face[5] accusation" and that the sixth amendment established a "rule of necessity," *i.e.*, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65.[6] However, a showing of unavailability by the party offering a hearsay statement need not always be made. In *Dutton v. Evans*, 400 U.S. 74 (1970), a witness testified as to a conversation he had with Evans' co-conspirator in the Atlanta Penitentiary. That testimony was admitted under a long standing co-conspirator exception to the hearsay rule under Georgia law. This Court found that the extra-judicial statement involved was of only "peripheral significance"[7] and that the utility of cross-examination was so remote that the Confrontation Clause did not require production of an apparently available witness. This is not the situation in the instant case, where the alleged victim was the only true witness against

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[5] Justice Scalia, during oral argument in Coy v. Iowa (No. 86-6757) on January 13, 1988, emphasized that the Confrontation Clause requires face-to-face confrontation. *See generally* 42 Cr.L. 4121-23 (Jan. 20, 1988).

[6] *Citing* Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900).

[7] *Id.* at 87.

petitioner. The incriminating hearsay statement of Jennifer Aspinwall was completely contrary to petitioner's exculpatory statement and testimony. Jennifer's hearsay statement was the only substantive evidence attributing criminal activity to petitioner.[8]

Neither a showing of unavailability nor production is required where the out-of-court statement offered is that of a co-conspirator during the course of, or the furtherance of, a conspiracy. *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986). In *Inadi*, this Court overruled the decision of a lower court applying the *Ohio v. Roberts* rule of unavailability to such statements. This Court recognized the unique nature of the statements of a co-conspirator made in furtherance of, or in the course of, a conspiracy[9], and concluded that such statements should be admissible irrespective of the availability or unavailability of the declarant. In the *Arnold* case (relied upon by the court below in the instant case (Appendix A)), the Court of Military Appeals cited *Inadi*, apparently for the erroneous proposition that if a hearsay statement falls within a firmly-rooted hearsay exception, no showing of unavailability is required. *Arnold*, 25 M.J. at 133. *See also United States v. Hines*, 23 M.J. 125, 128 fn.6 (C.M.A. 1986). This Court's decision in *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicates that such a broad reading of *Inadi* is not supportable. *Bourjaily*, like *Inadi*, involved the hearsay statements of a co-conspirator offered by the prosecution. In *Bourjaily*, this

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[8] No instruction was given by the trial judge limiting the court-martial members' consideration of Jennifer's hearsay statement. To the contrary, the trial judge specifically instructed that the statement could be considered as substantive evidence (R. 242).

[9] "[S]uch statements provide evidence of the conspiracy's context that cannot be replicated . . . . [T]he statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying. . . . [I]n-court testimony seldom will reproduce a significant portion of the evidentiary value of [a] statement during the course of the conspiracy." Inadi, 106 S.Ct. at 1126.

Court reiterated the two-step approach of *Ohio v. Roberts*, and then pointed out that in *Inadi* the first requirement for a showing of unavailability was eliminated when the hearsay statement is that of a co-conspirator offered by the prosecution. *Bourjaily*, 107 S.Ct. at 2782.[10]

Thus, *Inadi* stands only for the proposition that a showing of unavailablity is not required when the hearsay statement involved is that of a co-conspirator. The statement involved in the instant case does not fall within the co-conspirator exception to the hearsay rule. Therefore, the Court of Military Appeals' abrogation of the unavailability rule based on *Inadi* is incorrect. Although this Court stated in *Ohio v. Roberts* that reliability may be inferred, without more, when a hearsay statement falls within a firmly-rooted hearsay exception, this Court has never held that unavailability may be inferred on the same basis.[11] Petitioner rejects the proposition that the party offering hearsay need not show the declarant unavailable before that statement may be admitted as evidence against an accused merely because it falls within a firmly-rooted hearsay exception. Such an argument is specious because *Inadi* and *Bourjaily* create an exception to that "general approach" only for statements of a co-conspirator made in the course and in furtherance of a conspiracy. *Inadi* is the exception and not the rule.[12]

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[10] This Court went on to hold that the co-conspirator exception to the hearsay rule is firmly rooted and, therefore, no separate inquiry as to the indicia of reliability of such a statement need be made, the second step of the *Ohio v. Roberts* approach.

[11] *But see* State v. Flores, No. 51790 (Ohio Ct. App. Feb. 26, 1987) (WESTLAW, ALLSTATES library, Ohio file); People v. Hughey, 194 Cal. App. 3d 1383, 240 Cal. Rptr. 269 (Cal. Ct. App. 1987); State v. Wilson, 719 S.W.2d 28 (Mo. Ct. App. 1986).

[12] Petitioner notes that the statement of a co-conspirator made during the course and in furtherance of a conspiracy is by definition not hearsay under both the military and federal rules of evidence. *Compare* Military Rule of Evidence [hereinafter Mil.R.Evid.] 801(d)(2)(E), and Federal Rule of Evidence [hereinafter Fed.R.Evid.] 801(d)(2)(E).

Although the trial judge may have found Jennifer Aspinwall to be unavailable to testify at a pretrial investigation hearing[13] and refused to issue a subpoena for her deposition (R. 102), his ruling at trial on the admissibility of her hearsay statement failed to address the issue of confrontation and unavailability. Furthermore, to the extent that the decision of the Court of Military Appeals relies on *Arnold*, that court apparently agreed with petitioner's argument that there was no showing by the government that Jennifer Aspinwall was unavailable.[14] Therefore, the requirements of the Confrontation Clause have not been satisfied and the victim's statement to her mother should not have been admitted.

II

THE STATEMENT OF THE VICTIM TO HER MOTHER DOES NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO SATISFY THE PURPOSES OF THE CONFRONTATION CLAUSE NOTWITHSTANDING ITS CLASSIFICATION AS AS EXCITED UTTERANCE BY THE COURT BELOW.

The second aspect of the two-prong approach of *Ohio v. Roberts* requires that the hearsay sought to be admitted be marked "with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Id.* at 65, *citing Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). The reason for the general rule, as explained by *Snyder*, it to prevent a conviction based on depositions or *ex parte* affidavits and to preserve the accused's right to test the recollection of a witness through cross-examination. If a declarant is

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[13] *See* Article 32, U.C.M.J.

[14] In *Arnold* the Army Court of Military Review had found "the government failed utterly to show unavailability. Indeed, the record contains no evidence that the government used any of the normal prosecutorial or judicial means available to secure the presence of the witness. . . ." Arnold, 18 M.J. at 561. The Court of Military Appeals acknowledged this. Arnold, 25 M.J. at 131.

unavailable and his out-of-court statement falls within a firmly-rooted hearsay exception, reliability can be inferred and the purposes of the Confrontation Clause are met.[15] The fact that the excited utterance exception is a firmly-rooted hearsay exception is not at issue here.[16] *See Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987); *United States v. Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984). *See also United States v. Cree*, 778 F.2d 474, 501-02 (8th Cir. 1985) (Oliver, J., dissenting). The issue also is not whether the statement of the victim in this case would be admissible as an excited utterance under Mil.R.Evid 803(2) as applied by the military courts. Rather, the issue here is whether or not the extrajudical statement of the victim contains "sufficient indicia of reliability and guarantees of trustworthiness to satisfy the interests protected by the confrontation clause." *Haggins*, 715 F.2d at 1057.[17]

In *Haggins*, 715 F.2d at 1050, the Circuit Court of Appeals listed three elements which are necessary for a hearsay statement to be considered an excited utterance under the federal rules and, therefore, to satisfy the Confrontation Clause: there must be an event which is startling enough to cause nervous excitement; the statement must be made before there is time for the declarant to contrive or misrepresent; and, the statement must be made while the declarant is under the stress of the excitement caused by the event. *Id.* at 1057. Application of these criteria in the instant case reflect that the statement of the victim does not contain sufficient indicia of reliability and guarantees of trustworthiness to satisfy the Confrontation Clause, notwithstanding its classification as an excited utterance by any lower court.

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[15] Ohio v. Roberts, 448 U.S. at 66.

[16] Mil.R.Evid. 803(2) is taken verbatim from Fed.R.Evid. 803(2). Manual for Courts-Martial, United States, 1984, Mil.R.Evid. 803(2), analysis.

[17] Although reliability may be inferred when an extrajudicial statement falls within a firmly-rooted hearsay exception (Ohio v. Roberts, 448 U.S. at 66), reliability is only an inference and not a presumption.

Petitioner submits that the mere fact that the court below may have conveniently tucked this hearsay statement "into a time honored hearsay exception" should not be dispositive. *Puleio v. Vose*, 830 F.2d at 1207. As explained in detail below, the hearsay statement of Jennifer Aspinwall does not meet the test for an exception to the general rule against use of hearsay. *See Haggins*, 715 F.2d at 1050. Therefore, no inference of reliability should attach for purposes of satisfying the Confrontation Clause.

Petitioner notes that to the extent the Court of Military Appeals relies on the cases of *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986), and *United States v. Iron Shell*, 633 F.2d 77 (1980), these cases are inapposite. *LeMere* was a case involving alleged child sexual abuse. In *LeMere*, the court held that because the victim was subject to cross-examination at trial, any error in the admission of the victim's hearsay statement was harmless. In the instant case, unlike the *LeMere* case, the petitioner had no opportunity at all to cross-examine, interview, or depose the victim.

In *Iron Shell*, the Eighth Circuit Court of Appeals held that the testimony of a doctor, who examined the nine-year-old victim, concerning statements made by her following her assault was related to her physical condition and was consistent with the motive to provide treatment and, therefore, came within the purview of Fed.R.Evid. 803(4), dealing with medical diagnosis and treatment. The court in *Iron Shell* also held that the hearsay testimony of a police officer as to what the victim said following the assault fell under the excited utterance exception to the hearsay rule when the victim's statement was made between 45 minutes and 75 minutes after the event. The Eighth Circuit in *Iron Shell* held that even if this statement was not an excited utterance, sufficient other evidence was available to find the hearsay cumulative and, therefore, its admission harmless error. The petitioner's case is not as easily resolved. In the instant case, five hours passed between the alleged offense and the statement by the victim, compared to the 75 minutes in *Iron Shell*; furthermore, the remaining evidence is inconclusive as to the petitioner's guilt.

Other facts in the instant case, in addition to the passage of time from the offense to the statement by the victim, subject her statements to a critical examination for reliability. Jennifer Aspinwall's statements to her mother were not volunteered but were elicited by her mother who became increasingly more tense and nervous as she questioned Jennifer. The conflicting stories which Jennifer gave to her mother and to Dr. Judah, the child psychologist, warranted cross-examination.[18] Most importantly, Jennifer had given opposite answers to a key issue of the case, *i.e.*, whether or not she touched petitioner's penis. Dr. Judah testified that Jennifer told him that she did not touch petitioner's penis (R. 89); the hearsay statement offered by Mrs. Aspinwall was that Jennifer did touch petitioner's penis (R. 33). Dr. Judah also presented a diagnosis which reflected on the reliability of the hearsay statement: that Jennifer's conduct was consistent with either an abused child (R. 65) or a lying child (R. 275). Clearly, the opportunity to cross-examine the only true witness was critical to petitioner's case.

CONCLUSION

The Court of Military Appeals affirmed the conviction of the petitioner. That conviction was based solely on extrajudicial hearsay statements of the four-year-old alleged victim admitted at trial through testimony by the victim's mother. The only true witness against petitioner, the alleged victim, was never present at trial, she was never subjected to cross-examination, and her demeanor was never subjected to face-to-face scrutiny by the trier-of-fact. The victim was never deposed, seen, or interviewed by the petitioner. Her damning allegations were merely repeated at trial by a partial and personally interested third party to whom they were made after the victim had had time for reflective thought and

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[18] Dr. Judah did not testify on the merits at trial, but Dr. Judah had testified at the pretrial investigation and during the preliminary session at the trial. Thus, petitioner's defense counsel had potential rebuttal evidence if Jennifer had testified on the merits.

several hours after the excitement of the events she related had passed. The necessity for proceeding against petitioner in this manner was never demonstrated by the government. There was no showing by the government that the victim was unavailable for purposes of the Confrontation Clause. Petitioner's right of confrontation was, therefore, violated by admission of the victim's extrajudicial statements in this case. The sixth amendment right of confrontation is a substantial right; the violation was neither minimal nor justified. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54572/AR
CMR Dkt. No. 446504

UNITED STATES, APPELLEE

v.

DANIEL L. LEWICKI (221-50-4560), APPELLANT

ORDER

Appellant was found guilty of taking indecent liberties with two females under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. His petition for review was granted to determine if admission at trial of the victim's statements regarding the offenses, through the testimony of her mother, violated appellant's right of confrontation because the child did not appear in court. We hold it did not. Mil.R.Evid. 803(2), Manual for Courts-Martial, United States, 1984. *See United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). *See also United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), and *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986). Accordingly, it is, by the Court, this 2d day of February, 1988,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

Judge SULLIVAN concurs in the result.

For the Court,

/s/ John A. Cutts, III
JOHN A. CUTTS, III
Deputy Clerk of the Court

EVERETT, Chief Judge (dissenting):

See my dissenting opinion in *United States v. Arnold*, 25 M.J. 129, 134 (C.M.A. 1987).

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (LONERGAN)
Appellate Government Counsel (O'HARE)

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 446504

UNITED STATES, APPELLEE

v.

SERGEANT E-5 DANIEL L. LEWICKI (221-50-4560), UNITED STATES ARMY, APPELLANT

Before

COMEAU, WATKINS, AND LYMBURNER
Appellate Military Judges

S. L. TRAIL, Military Judge

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Major Edwin D. Selby, JAGC, Captain Claudio F. Gnocchi, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Michael W. Hoadley, JAGC (on brief).

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9 December 1985

MEMORANDUM OPINION

Per Curiam:

Convicted contrary to his pleas and punished by general court-martial for taking immoral and indecent liberties with two female children under the age of sixteen, the appellant

alleges error in the trial record resulting from (1) the failure of the trial judge to direct the reopening of the pretrial (Article 32, UCMJ) investigation or, alternatively, to order that the two alleged victims be deposed,[1] and (2) a denial of the right of confrontation with respect to the alleged victim Jennifer A. We find no error or other basis for appellate relief and affirm.

Concerning the former assignment of error, we have no difficulty in concluding that the judge's ruling was correct. Pertinently, the record of trial reflects (1) that, along with several other witnesses, Candice appeared at the Article 32 Investigation; (2) that Jennifer A. was absent and was determined to be unavailable; and (3) that the defense did not request that either of the alleged victims be called to testify at the pretrial investigation. Under such circumstances, we find that the trial judge did not abuse his discretion in denying the requested relief.

Similarly, in view of the fact that the accused did not at any time request that Jennifer A. be called as a witness at his court-martial, we find no confrontation violation.

We have also considered the issues raised personally by the appellant and determined that they are without merit.

The findings of guilty and the sentence are affirmed.

FOR THE COURT,

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of the Court

[1] The alleged victims in this case were Candice, four-year-old daughter of the appellant and Jennifer A., four-year-old playmate of Candice.

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